No. 89-1404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL CAMERON AND KAREN CAMERON,

Petitioners,

v.

BEELER, SCHAD AND DIAMOND, P.C.
an Illinois professional corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Beeler, Schad and Diamond, P.C., respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Seventh Circuit Court of Appeals.[1]

[1] The original Petition for Certiorari, dated January 29, 1990, was rejected by the Clerk of this Court for violations of Rule 14.1(a) and Rule 33.1(c). Although Petitioners' Certificate of Service (*see* Appendix D) recites that copies "were hand delivered on March 5, 1990," copies of the second version were not received by Respondent until March 6, 1990. Petitioners'

OPINIONS AND JUDGMENTS BELOW

Contrary to Petitioners' statement, the Order designated as Appendix C in the Petition is not the order "denying JNOV". Pet. at 5. That order, along with other orders which should have been included in Petitioners' Appendix pursuant to Rule 14.1(k)(ii), are included in Respondent's Appendix as Appendixes E-H.*

COUNTERSTATEMENT OF THE CASE

A. The Jury's General Verdict On The Pet Milk Claim

Because one of Petitioners' claims is that there was inconsistency between the jury verdict and the jury instructions, some clarification of the trial court record is necessary. In 1985, Petitioners requested a fixed fee quotation on the Pet Milk project, and they were given a fixed fee quotation —not an estimate—resulting in a fixed fee contract for $525,000. (Tr. 71-72, 75-76). The only estimate provided by Respondent related to out-of-pocket costs which by their nature could not be "fixed" before the project was complete. (Tr. 73-74). After the Pet Milk project ended and Petitioners delayed payment on the contract, Respondent sent an October 10, 1986 invoice reflecting: (a) the $525,000 fixed fee *less* a $50,000 discount as incentive for prompt payment; (b) plus $24,868.31 of advanced costs; (c) for a total of

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Certificate fails to include the statement required by Rule 29.5 and is not "signed by a member of the Bar of this Court" as required by Rule 29.5(b).

* A copy of Respondent's Appendix (D-O), with all documents reproduced in their original size and format, has been separately lodged with the Clerk of this Court and served upon counsel for Petitioners.

$499,868.31. *See* Appendix O.[2] Petitioners did not pay the bill, which became one of the claims in this lawsuit.

In addition to the above-described express contract theory, Respondent pursued other theories of recovery on the Pet Milk claim, including contract implied in fact and contract implied in law. *See* Appendix N at N4-N6. After being instructed that Respondent "only needs to prove one of these theories to prevail on this claim,"[3] the jury returned a general verdict on the Pet Milk claim in the amount of $499,868.31—the exact amount of Respondent's October 10, 1986 invoice. *See* Appendix M. This general verdict (without any special interrogatories) did not identify which of plaintiff's five theories of recovery it was based on. *Id.*

B. Petitioners' Motion For Judgment Notwithstanding The Verdict

According to Petitioners, the "main issue raised by this case" is "which standard—state or federal—should be applied in a diversity case" in deciding "a motion for *JNOV*." Pet. at 9-10, 13. Petitioners' JNOV motion (*see* Appendix I), however, contained no reference to either a federal or state standard of review, and no such standard of review issue was ever addressed by the trial court, which simply denied the motion without explanation. *See* Appendix E.

C. Petitioners' Briefs In The Seventh Circuit

Similarly, Section II of Petitioners' main brief to the Seventh Circuit (pages 11-18) merely argued that "the jury verdict and the trial court's denial of the JNOV are against

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[2] Petitioners misstate the record when they assert that "[o]n October 10, 1986, the Respondent sent the Petitioners a bill for the alleged 'fixed fee' of $525,000." Pet. at 8.

[3] *See* Appendix N at N2.

the manifest weight of the evidence," without reference to either a federal or a state (Illinois) standard of review. *See* Appendix J at J6. Accordingly, Petitioners made no mention of any alleged conflict between the federal standard and Illinois standard of review, and it was not an issue on review. Respondent's brief to the Seventh Circuit (Plaintiff's Br. at 29-30) simply pointed out that Petitioners' argument regarding a manifest weight of the evidence standard was incorrect. *See Thor Power Tool Company* v. *Weintraub*, 791 F.2d 579, 583 (7th Cir. 1986).

Petitioners, in their reply brief to the Seventh Circuit, again never suggested a conflict between the federal standard and the Illinois standard of review, and never suggested the inapplicability of the Illinois standard as stated in *Thor*. In fact, Petitioners welcomed the application of the Illinois standard and based their reply on that very standard. In that regard, Petitioners stated:

> The plaintiff has stated that the defendants in their original brief, asserted the wrong standard on review. (Plaintiff's Brief pp. 29-30). The defendants suggested that the jury's verdict was against the manifest weight of the evidence. (Defendant's Brief pp. 11-16). In fact, as *Thor Power Tool Co.* v. *Weintraub*, 791 F.2d 579 583, (7th Cir. 1986) clearly states, the standard on review is not the "against the manifest weight of the evidence" or "abuse of discretion" standards but instead, *in Illinois*, it [sic] as follows:
>
> > . . . "Judgment notwithstanding the verdict is properly granted by the trial court only when the evidence is so overwhelming in favor of the movant that no contrary verdict based on that evidence could ever stand." *Id.*
>
> In essence, the *Thor* standard appears to be merely a different way of saying against the manifest weight of

> the evidence. In any event, the outcome should be the same when applying either standard.
>
> The whole concept of the *JNOV* device is it is used to correct unsupported verdicts so that an appellate court will not be faced with that task. In the instant case, the evidence simply did not establish the existence of a contract. (See Defendant's Brief, pp. 11-16). The *Thor* standard dictates that the court must determine whether the evidence is so overwhelmingly in favor of the defendants.

Appendix K at K2-K3 (emphasis added).

D. The Seventh Circuit's Opinion

Now, despite having based their argument to the Seventh Circuit on the Illinois standard of review, Petitioners are criticizing the Seventh Circuit for applying the Illinois standard.[4] Additionally, Petitioners are arguing for the first time that there is a material conflict between the federal and Illinois standards of review, without offering any basis for this conclusion. Likewise, Petitioners offer no basis for their conclusion that the alleged conflict was material to the Seventh Circuit's decision—*i.e.*, that application of the federal standard would have altered the Seventh Circuit's decision. *See generally* Pet. at 9-15.

E. The Petition For Rehearing

Finally, Petitioners fail to address the fact that their petition for rehearing filed with the Seventh Circuit also contained no reference to the above-mentioned standard of review issue. *See* Appendix L.

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[4] *See* the Seventh Circuit's opinion, Appendix A at 6-8.

REASONS WHY THE PETITION SHOULD BE DENIED

Summary Of Reasons

Contrary to Petitioners' claim, this Petition has absolutely no relevance "to the entire federal court system at large." Pet. at 19. It is nothing more than a thinly-veiled attempt at persuading this Court to give Petitioners yet another bite at the apple regarding purely factual issues resolved by the jury in a simple contract suit under state law.

The so-called standard of review issue should be rejected for the reasons stated by this Court in *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959), and *Mercer* v. *Theriot*, 377 U.S. 152 (1964). Petitioners should not be heard to complain that the Seventh Circuit applied precisely the same state standard that Petitioners relied upon in their reply brief before that court. Moreover, Petitioners' attempt to distinguish *Dick* is based upon obvious record distortions, since this issue was never raised in either the trial court or the Seventh Circuit. This Petition represents exactly the type of "[f]abulous inflation" and "verbal smoke screen" that Justice Frankfurter warned about in *Dick*. 359 U.S. at 455 (Frankfurter, J., dissenting).

The second issue relating to the jury's general verdict should be rejected because it is particularly fact specific with no relevance to the overall federal court system. Even ignoring Petitioners' record distortions, there is more than sufficient evidence in this record to support the jury's verdict on this claim under any or all of the five theories before it.

I. Contrary To Petitioners' Assertions, The Standard Of Review Issue Was Never Raised In, Or Addressed By, The Seventh Circuit

In deciding not to address the standard of review issue which Petitioners now purport to raise, this Court stated in *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959):

> But the question is not properly here for decision because, in the briefs and arguments in this Court, both parties assumed that the North Dakota standard applied. Moreover, although the Court of Appeals appears to have applied the state standard, that court did not discuss the issue. Under these circumstances, we will not reach out to decide this important question particularly where, in the context of this case, the two standards are substantially the same.

359 U.S. at 445. But for the reference to North Dakota (instead of Illinois), this Court's statements in *Dick* are completely applicable here because: (a) both parties assumed that the Illinois standard applied; (b) although the Seventh Circuit applied the Illinois standard, it did not discuss a federal standard; and (c) in the context of this case, the two standards are substantially the same.

With respect to point (a), Petitioners should not be heard to complain that the Seventh Circuit applied precisely the same state standard that Petitioners quoted, relied upon, and argued in their reply brief before that court. Contrary to Petitioners statement at page 14 of the Petition, the parties did *not* raise the issue of different standards of review (in the context of federal versus state standards) in their briefs to the Seventh Circuit. *See* Rule 14.5 ("The failure of a petitioner to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.").

With respect to point (b), the Seventh Circuit never discussed any possible difference between the federal standard and Illinois' standard of review. Consequently, the Seventh Circuit never stated that the Illinois standard "is a more strict standard." Pet. at 14. The Court of Appeals merely noted that the Illinois standard was a "strict standard." *See* Appendix A at 7. Therefore, the record clearly demonstrates, despite Petitioners' assertions, that the issue of whether to apply a state or federal standard was never raised in, or addressed by, either the district court or the Seventh Circuit. *See Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 445 (1959); *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 486 (1933) (issue "not assigned as error on appeal to the Court of Appeals; nor did that court mention the matter").[5]

With respect to point (c), it should also be noted that there is little, if any, difference between the Illinois and federal standards. The Illinois standard, which Petitioners espoused in their reply brief before the Seventh Circuit, states that "judgment notwithstanding the verdict is properly granted by the trial court only when the evidence is so *overwhelmingly* in favor of the movant that no contrary verdict based on that evidence could ever stand." *See* Appendix K at K2; (emphasis added). *See also Thor Power Tool Co.* v. *Weintraub*, 791 F.2d 579, 583 (7th Cir. 1986). The most frequently quoted federal standard looks to whether "the facts and inferences point so strongly and *overwhelmingly* in favor of one party that the Court believes that reasonable men could not arrive at a contrary ver-

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[5] *See* Rule 15.1 (strongly admonishing counsel for Respondents of their "obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later") (emphasis in original).

dict. . . ." *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (emphasis added).[6] *See also Federal Deposit Ins. Corp.* v. *Palermo*, 815 F.2d 1329, 1335 (10th Cir. 1987), *quoted in* Pet. at 12 ("all the inferences to be drawn from the evidence are so in favor of the moving party that reasonable persons could not differ in their conclusions."). Further review is unnecessary or inappropriate when the state and federal standards are "substantially the same". *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 445 (1959); *accord DeWitt* v. *Brown*, 669 F.2d 516, 523 (8th Cir. 1982) (state and federal tests "similar"); *Longenecker* v. *General Motors Corp.*, 594 F.2d 1283, 1285 (9th Cir. 1979) (two standards "functionally identical"); *McIntyre* v. *Everest & Jennings, Inc.*, 575 F.2d 155, 158 (8th Cir. 1978) ("substantially the same"); *Farner* v. *Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir. 1977) ("substantially the same").

Finally, there is more than ample evidence in this record to support the trial court's denial under any standard—state or federal. *See Mercer* v. *Theriot*, 377 U.S. 152, 156 (1964); *DeWitt* v. *Brown*, 669 F.2d 516, 523-24 (8th Cir. 1982); *Simblest* v. *Maynard*, 427 F.2d 1, 5 (2d Cir. 1970).

II. The Jury Verdict Issue Is Particularly Fact Specific And Has No Relevance To The Federal Court System At Large

Petitioners' claim relating to the jury's general verdict has nothing to do with the federal court system at large, and is so fact specific that Petitioners cannot cite any case with facts or instructions even remotely close to the record here. Moreover, Petitioners' claim of inconsistency between the

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[6] Petitioners quote *Boeing* in their Petition. Pet. at 13.

jury verdict and the jury instructions is not even supported by the record.

The jury was instructed that the Pet milk claim was being made "under five different theories", including express contract, contract implied in fact and contract implied by law. *See* Appendix N at N2-N7. Additionally, the jury was specifically instructed that Respondent "only needs to prove one of these theories to prevail on this claim." *Id.* at N2. In deciding this issue, the Seventh Circuit only addressed one of these theories, finding that there was sufficient evidence under the theory of express contract to support the jury verdict. *See* Appendix A at 7. The Court of Appeals therefore found it unnecessary to consider the other theories, noting, for example, that "there is no need to consider the alternative *quantum meruit* theory advanced by the Beeler firm." *Id.* at 7-8.

Initially, Respondent submits that the Seventh Circuit was correct in affirming the jury verdict on the express fee contract. As previously stated, the general verdict in the amount of $499,868.31 was exactly the amount of Respondent's bill for the Pet Milk project.[7] Moreover, as this Court has noted: "Appellate courts should be slow to impute to

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[7] Petitioners also distort the record in at least two other instances. First, they claim that the Seventh Circuit followed "the *Heller* rule" in *Pomer* v. *Schoolman*, 875 F.2d 1262, 1267 (7th Cir. 1989). *See* Pet. at 17. Yet a examination of the *Pomer* decision reveals that the court does not even cite *Heller*, let alone apply "the Heller rule". Likewise, Petitioners claim that in this case "the Seventh Circuit refused to follow the *Heller* rule." Pet. at 17. *Heller*, however, is not even cited in either of the briefs filed by Petitioners in the Seventh Circuit, and it is therefore apparent that "the *Heller* rule" was never raised in, or addressed by, the Seventh Circuit. *See* Appendixes J, K.

juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933). Since the jury's verdict "was possible on the evidence it cannot be attributed to disregard of duty." *Union Pacific R. R.* v. *Hadley*, 246 U.S. 330, 334 (1918); *accord Pomer* v. *Schoolman*, 875 F.2d 1262, 1267 (7th Cir. 1989) ("we are obliged to assume, in the absence of compelling contrary indications, that a jury obeys its instructions . . . ."). *See generally City of Los Angeles* v. *Heller*, 475 U.S. 796, 800-08 (1986) (Stevens, J., dissenting).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

April 5, 1990

Respectfully submitted,

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